THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0533, State of New Hampshire v. David Burns, the court on June 22, 2005, issued the following order:

The defendant, David Burns, appeals his convictions for attempted murder and simple assault. We affirm.

On appeal, the defendant argues: (1) that the trial court should have instructed the jury that to find him guilty of attempted murder, it must find that he acted deliberately and with premeditation; and (2) that the trial court erred in finding that he validly waived his Miranda rights. See Miranda v. Arizona, 384 U.S. 436 (1966).

The trial court instructed the jury that there are "two different definitions of murder and if you find the defendant attempted to commit either one of them, you may find the defendant guilty of attempted murder." The court then instructed the jury as to the elements of first-degree murder if caused purposely, RSA 630:1-a, I(a) (1996), but did not instruct the jury that the defendant's acts had to have been deliberate and premeditated. See RSA 630:1-a, II (1996). The court also instructed the jury as to the elements of second-degree murder if caused knowingly. See RSA 630:1-b, I(a) (1996). The court then instructed the jury that the State was required to prove:

> (1) That the defendant intended that the crime of murder be committed; that is, that the defendant acted with the purpose that the crime of murder be committed. To act purposely means that the defendant had the conscious object to commit the crime of murder.
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> The key words here are conscious object. Conscious object means that it was the defendant's specific intent or desire to commit the crime of murder. It means that the defendant desired to cause the death of the alleged victim. It is not enough for the [S]tate to prove that the defendant created the risk of the injury or death.
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> (2) That the defendant took a substantial step toward the commission of the crime. The acts by the defendant must be more than mere preparation to commit the crime of murder, the acts must be a substantial step towards the commission of the crime of murder.

The defendant argues that it is logically impossible to commit attempted second-degree murder because the crime of attempt requires that the defendant specifically intend to commit the underlying offense, while the crime of second-

degree murder does not require proof that the defendant intended to kill the victim. See RSA 629:1, I (1996); RSA 630:1-b, I(a). Therefore, the only type of attempted murder is attempted purposeful first-degree murder. Since RSA 630:1-a, II requires proof that the defendant's acts were deliberate and premeditated in order to convict a defendant of purposeful first-degree murder, the defendant concludes that whenever a defendant is charged with attempted murder, he or she is entitled to a jury instruction that the State must prove that the defendant's acts were deliberate and premeditated.

Whatever merit the defendant's argument may have as a matter of logic, we have previously rejected it as a matter of statutory construction. In State v. Allen, 128 N.H. 390 (1986), we considered the argument that attempted first-degree murder is the only punishable theory of attempted murder. We rejected it, noting that it "would leave no penalty for an act committed with a purpose to cause death but without deliberation and premeditation. Obviously, it would be unreasonable to infer a legislative intent to provide such a loophole." Allen, 128 N.H. at 396; see State v. Hutchinson, 137 N.H. 591, 594-96 (1993); cf. RSA 625:3 (1996) (Criminal Code provisions are not strictly construed, but are construed according to fair import of their terms and to promote justice).

The defendant invites us to overrule Allen and Hutchinson. We are not persuaded that our past rulings have "come to be seen so clearly as error that [their] enforcement was for that very reason doomed." Jacobs v. Director, N.H. Div. of Motor Vehicles, 149 N.H. 502, 504-05 (2003). We note that the issue before us is one of statutory construction, and thus the legislature has the ability to modify the statute if it disagrees with our interpretation. The legislature's failure to have done so counsels against overruling our case law. See id. at 506. Accordingly, we adhere to the doctrine of stare decisis and decline the defendant's invitation.

The defendant next argues that the trial court erred in finding that he validly waived his Miranda rights. We first address his argument under the State Constitution. See State v. Ball, 124 N.H. 226, 231 (1983). We will not reverse the trial court's findings on the issue of waiver unless the manifest weight of the evidence, when viewed in the light most favorable to the State, is to the contrary. State v. Zwicker, 151 N.H. 179, 186-87 (2004).

The trial court found that Officer Peterson read the defendant his Miranda rights from a department-issued Miranda card. The defendant indicated that he understood his rights, agreed to talk to the police, and signed the back of the card. Although the defendant was upset, he appeared coherent during the interview and was appropriately responsive to questions. Nothing in his demeanor or appearance led the police to believe that the defendant was under the influence of drugs or alcohol. The record supports these findings, and we conclude that the trial court did not err in ruling that the State met its burden of

proving beyond a reasonable doubt that the defendant knowingly and voluntarily waived his Miranda rights. See State v. Duffy, 146 N.H. 648, 650 (2001).

Because the Federal Constitution affords the defendant no greater protection in this area than does the State Constitution, see State v. Prevost, 141 N.H. 647, 651 (1997), we reach the same result under the Federal Constitution.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk